

NO-LOSE DIVORCE

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by

JOHN A. SAUER  
CH (MAJ) CAL ARNG  
40th Inf Div (Mech) Support Command Chaplain  
Long Beach, California

6906 Bluebell Avenue  
North Hollywood, California  
91605

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## INTRODUCTION

Few personal crises in life challenge the chaplain's counseling rôle as formidably as the ordeal of divorce. He is frequently called upon to serve not only as an independent referee, but a spiritual, financial and quasi-legal advisor as well.

The writer submits this paper based on twelve years of experience in the parish ministry, the last nine spent in an urban setting in Southern California, as well as three years of experience as a family law attorney in Southern California. His own experiences in working through a divorce in his own personal life also give him a unique vantage point through which to view this very difficult problem, a problem which is not only touching more and more lay people, but clergymen as well.

Is there a way, given the legal system in which one must function, for divorcing couples to work through this painful process in a more constructive and rehabilitative manner? Can a family unit be split up in such a manner that each member of that family, including the children, retains a sense of worth and a sense of belonging? This writer thinks it is possible, if the right attitudes and interaction can be encouraged and nurtured. It is this writer's opinion that the chaplain, reserve or active duty, can play a major role in the attainment of these goals. These goals may be summed up in the title of this paper, "No-Lose Divorce."

## AMELIORATING THE ADVERSARY SYSTEM

Divorce, by the very nature of the proceeding, is set within the confines of an adversary system. Whether the parties are called plaintiffs or defendants, petitioners or respondents, the fact remains that one party finds himself in a conflict of interest with the other party. Can anything be done to soften or overcome this system?

One might at first suppose that an easy solution to the problem is simply to have one attorney serve as legal advisor and counselor to both husband and wife, enabling them together to work out an amicable and fair settlement of the issues. This procedure is fraught with problems, however, since an attorney can represent only one party; he must, by the code of ethics to which he is bound, look out primarily for the interests of the client who has retained him. It is a mistake, therefore, for a chaplain to advise divorcing couples to have one attorney work out an equitable settlement for them. Both parties are ethically and legally entitled to independent counsel; the chaplain should encourage each to obtain his own, independent legal counsel.

Ameliorating the adversary system, then, must begin with the attitudes and presumptions of the parties themselves. Without such attitudes and presumptions, they will be ill equipped to make the important decision of choosing the right attorney, the subject of the next section.

The attitudes and presumptions of the parties as they approach divorce must be separated from the strong emotions and

hurt feelings which have led up to the decision to separate. Many spouses choose to use the divorce proceeding as an arena in which to humiliate and punish the other spouse, not only before the eyes of the children of the marriage, but before the friends and acquaintances of the parties themselves. This is unfortunate, and the chaplain needs to employ all of his counseling and persuasive skills in leading spouses down a more constructive, wholesome path.

The chaplain must convince the divorcing couple that there is no real "winner" or "loser" in this proceeding, that both parties are not only entitled to that which the law of the land prescribes, but also the right to put their own lives back onto a positive and fulfilling course, albeit a course separate from each other.

With this in mind, it is important that the chaplain realize that there are few situations where the breakdown of the marital relationship is completely one party's fault. After all, the parties once loved each other enough to marry; the decision to separate must have been the result of actions and failures to act on the part of both parties.

Once both parties have faced up to the legal and ethical reality that each party is entitled to move constructively into a more positive and fulfilling stage of life, rather than each party clinging to the notion that he must somehow "win," the parties will be ready to make that all-important decision on choosing the attorney to represent them individually.

## CHOOSING THE RIGHT ATTORNEY

One of the first things a chaplain should do upon locating in a new area is to investigate the resources available to him. Of prime importance in this investigation is the location of competent, ethical, legal counsel. Advising a counselee to find an attorney by looking through the Yellow Pages of the telephone book is tantamount to asking him to make a blind, random choice. The same applies to newspaper advertisements. The right attorney is not necessarily the cheapest one, nor the one with the most impressive credentials or pedigree. Advising a counselee to find an attorney by consulting the local bar association may result in his finding only the attorney who happens to be the least occupied on that given day.

In order to adequately refer his counselee to the kind of attorney envisioned by this paper, the chaplain must make himself aware and informed of the legal counsel available in his community. He may do this by talking with those within his circle of acquaintances who have gone through divorces. He may also do this by talking with local pastors and marriage counselors in the community, insofar as they can give information which is not in violation of any confidential relationship.

The chaplain must warn his counselee against retaining an attorney who simply has a reputation of "taking him for all he's worth," or a reputation of being a "fighter." Many of these attorneys stir up their clients and drag them through the courts with only one motive: increased legal fees. After all, the

more controversy one can encourage, the more time required in resolving those controversies, and the more legal fees incurred with which to line the "fighting" attorney's pockets.

This is not in any way to suggest that the right attorney is simply a meek, submissive one; on the contrary, where forceful and decisive action is required, it must be taken. Where a court hearing is required for the protection of a client's interests, that hearing must be set and vigorously conducted. What is being suggested, however, is that many matters of controversy in divorce can be resolved without the necessity of such emotionally upsetting and harrowing experiences. An attorney whose first thought is to haul the parties into court for restraining orders and temporary support, without attempting to work out a settlement of these issues between the parties and their attorneys is doing a disservice to his client as well as the legal profession,

The right attorney, then, is competent and ethical, not afraid to take decisive action when necessary, but equally willing to resolve issues by settlement whenever possible. He espouses the philosophy that neither party to a divorce "wins," but that both parties ought to be able to begin a new chapter in their respective lives, a chapter which will be positive in direction and fulfilling in purpose. An attorney in such a situation has assisted his client in achieving a "no-lose divorce," and the chaplain who has fostered that attitude in his counselee and referred his counselee to an attorney with that frame of reference has counseled well.

## DISARMING THE WEAPONS: PROPERTY AND CHILDREN

One of the tenets of the "win-lose" philosophy of divorce is that one party attempt to "take the other for all he's worth," and "win custody of the children." These two weapons in the armament arsenal of the divorce arena are responsible for most of the anguish and bitterness resulting from divorce today.

Can the chaplain as counselor do anything to disarm these weapons? This writer feels that he can do much to influence the attitudes and presumptions of those he counsels regarding these two areas of potential conflict and heartache.

The writer presents the views in this section with an obvious bias. He is licensed to practice law in the State of California, and his legal ideals, therefore, find their origin at least in part within the statutes and decisions of the State of California. The State of California for years has operated under a system of family law which can loosely be described as "no-fault divorce." Under this system, the only recognized ground for divorce, other than incurable insanity, is a condition described as "irreconcilable differences." California courts have eliminated the necessity of proving cruelty, adultery, desertion, etc.; all that is required is a showing that the parties cannot get along anymore, and that such differences exist which totally and irreparably prevent a reconciliation.

The writer's views are also influenced by one other important factor in California law, and that factor is the community property system. In this system there is a presumption that all property gained



during marriage, regardless of who paid for it and who was the primary bread-winner, belongs equally to both parties. The only exceptions are gifts, inheritances, and under certain circumstances, personal injury awards. This system requires an equal distribution of community property upon the dissolution of the marriage, regardless of any "fault" issues.

Given these two strongly influential systems in California law, how can the two weapons of "property" and "children" be disarmed, so that these two potential sources of conflict can be resolved in a manner reasonably acceptable to both parties? More importantly, how can the chaplain assist in disarming these two weapons?

As to the weapon of "property," the law of the writer's state makes this weapon comparatively easy to disarm. If the law of the land requires an equal distribution of the property acquired during the marriage, then no amount of haranguing, arguing, fault-finding, or personal attacks will enable one party to "punish" the other party for alleged wrongs during the marriage by taking a share of that party's property away from him. The court simply will not allow it. Removing fault from the arena in which property is divided requires that the only issues before the court are the nature of the property (community or separate), the value of the property (sometimes an elusive entity), and how and when it will be divided.

The chaplain can be of great assistance in fostering and nurturing an attitude which discourages the parties from attempting to "punish" each other for their alleged wrongs by "taking

all my marbles away and going home." On the contrary, each party is entitled to an equal share of the marbles, regardless of how much cheating went on during the game. Women are often the ones who resent this aspect of the family law system the most, especially when they are not the party seeking the divorce. The chaplain needs to apply all his counseling and persuasive skills in encouraging his counselee to accept the premises upon which the law of the land are based. Both parties need to be brought to the realization and acceptance of the fact that each of them has the legal, moral and ethical right to begin a new chapter in his personal life, and that the new chapter requires a foundation upon which to build. An important aspect of that foundation is the purely material and monetary base which will enable the party to look for a more fulfilling, productive and creative life, albeit separate from his former spouse.

It is not nearly so easy to disarm the weapon of "children," since by its very nature this weapon is fraught with conflicting emotions, personal needs and underlying pre-sumptions. In no area of divorce do "red flags" come catapulting out of the foray as frequently and viciously as they do when the weapons of custody and visitation are armed and launched.

How can the chaplain assist in disarming this weapon, or at least averting some of the disabling and crippling effects brought about by the wholesale and irrational use of this, the most strategic and deadly of all the weapons in the armament of the divorce arena?

For one thing, he can assist his listeners in accepting the axiom that "parents are forever," that divorce does not

require that the children of the marriage choose between their parents, even when one parent will have the legal custody and the other rights of visitation.

It is often incomprehensible to a divorcing or divorced parent that his children do not incorporate into their personalities the same feelings and emotions about the former spouse that he harbors. He somehow expects that his opinions, emotions and feelings about his ex-spouse will be transferred to his children, effectively by-passing any positive and warm experiences that may be indelibly etched into the memory of his children.

The chaplain needs to encourage his listener that the divorce of husband from wife does not mean the divorce of parent from child, regardless of who has custody. Above all, he must encourage the custodial spouse to give the non-custodial spouse the most liberal of visitation opportunities, and discourage any form of "punishment" of the other parent by the withholding of visitation or the poisoning of the minds of the children against the non-custodial parent. Sooner or later, such activities catch up with the party seeking to punish through children, often to the serious detriment of the relationship between the parent and the children.

It is important that the chaplain assist his hearers in understanding that the children of divorcing and divorced parents are not pawns in some chess game of life, in which scores are reported and gloated over in terms of who "won" custody. The writer cringes every time he reads a court order "awarding" custody to one party or the other. Children are not "awarded"

and their lives parcelled out like one divides an acre of land into lots. The chaplain who enables his counselee(s) to adopt this attitude toward the children of the marriage has successfully disarmed one of the most lethal weapons of the divorce arsenal.

## CONCLUSION

It is apparent to even the most casual of observers that the chaplain will be called upon more and more to counsel those who are divorcing and those who are having difficulty coping with the results of divorce. The writer has attempted in this paper to outline a course of conduct on the part of the chaplain which will enable him first of all to shape and mold his own attitudes and presumptions with regard to divorce, and secondly to influence in a positive direction those he counsels during this disruptive stage of life facing more and more people today.

It is hoped that this paper will have achieved its goal of encouraging "No-Lose Divorce" by softening the adversary system in which divorce necessarily occurs, by leading divorcing parties to make enlightened and wholesome decisions when choosing a lawyer to represent them individually, and by disarming the weapons of the divorce arsenal so that all those influenced by the divorce, children as well as parents, can begin a new stage in their individual lives, one which is positive, enriching and fulfilling.